Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1994

KEITH RICHARD DOLNY,

Petitioner,

vs.

ROBERT ERICKSON, Warden,
MINNESOTA STATE PRISON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's right to confrontation was violated where out-of-court statements of a child witness were received in a state sex offense prosecution where the child testified by videotape and the trial judge relied on corroboration of the statements in ruling them admissible?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE PETITION 9

CONCLUSION 20

APPENDIX A-1

TABLE OF AUTHORITIES

PAGE

Cases

California v. Greene, 399 U.S. 149 (1970) 16,18

Coy v. Iowa, 487 U.S. 1012 (1988) 18,19

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 19

Idaho v. Wright, 497 U.S. 805 (1990) 7-9, 14, 15, 17

Lee v. Illinois, 470 U.S. 530 (1986) 9, 11

Maryland v. Craig, 497 U.S. 836 (1990) 18,19

Ohio v. Roberts, 488 U.S. 56 (1980) 9

Pointer v. Texas, 380 U.S. 400 (1965) 15

Ring v. Erickson, 983 F.2d 818 (8th Cir. 1992) 19

State v. Dolny, No. C5-91023, Minn. Ct. App. 6/25/91 9

United States v. Balfany, 965 F.2d 575 (8th Cir. 1992) 17

United States v. Owens, 484 U.S. 554 (1988) 18

United States v. Spotted War Bonnet, 933 F.2d 1471 (8th Cir. 1991) 12, 15, 17

White v. Illinois, 502 U.S. — (1992) 9, 11, 19

United States Constitution

Amendment VI 2

Statutes

Minnesota Statute §595.02 ..... 7, 8, 19

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PETITION FOR WRIT OF CERTIORARI

Petitioner Keith Richard Dolny petitions for a writ for certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals is reported as Dolny v. Erickson, 32 F.3d 381 (8th Cir. 1994). The earlier unreported

decision of the Minnesota Court of Appeals on direct appeal of the conviction in State v. Dolny is reproduced in the appendix.

JURISDICTION

Judgment was entered August 19, 1994. There was no petition or order for rehearing. The statutory provision believed to confer jurisdiction for review on certiorari is 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution:

AMENDMENT VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted after jury trial in state court in Minnesota, of first degree criminal sexual conduct. The Minnesota Court of Appeals affirmed the conviction and the trial

court's denial of a petition for post-conviction relief in an unpublished opinion. (Appendix.)

He then filed a petition under 28 U.S.C. § 2254 contending that his rights to confrontation and due process were violated by the use in evidence against him of out-of-court statements made by the alleged victim, K.S., who was seven years old at the time of trial. (Trial Transcript, hereafter T. 20). Though it was agreed K.S. was competent to testify (T. 22), after some preliminary questions, she was asked about something "bad" that happened with petitioner, and she began to have difficulty and said she was afraid (T. 20-26); after questioning out of the presence of the jury, the trial judge ruled she was "psychologically traumatized by the presence of the defendant in the courtroom" and that her testimony could be videotaped with Mr. Dolny observing by closed circuit television from a separate room (T. 31-38). Mr. Dolny and his counsel agreed there would be no separate screen showing Mr. Dolny to the witness while she testified (T. 35-41). The videotape was then played for the jury, with no comment as to whether Mr. Dolny had been present when the videotape was made (T. 81-82). The use of the videotape as such was not challenged.

The trial court also allowed testimony by the child's mother as to statements K.S. made to her more than a year after the alleged offense to the effect she had bad dreams and was afraid of Mr. Dolny (T. 183-185), and statements K.S. made some ten months later (i.e. almost two years after the alleged events). Those statements, and those discussed hereafter, were challenged in a pre-trial hearing, then on appeal, and in the proceedings under 28 U.S.C. §2254, raising the confrontation issue here presented. (Pre-trial Hearing, P.T. March 20, 1990, pp. 7-10).

The first allegations were made when the child was in trouble and frightened of possible discipline, were extracted by the

mother's questioning, and concerned things that supposedly happened about two years before.

The trial judge said in admitting these statements:

> I believe they have sufficient indicia of reliability. With respect to the time they were reported, it was a reasonable time. Given the nature of the offense, the age of the child and reviewing the reports, I believe questions were not asked in a suggestive and leading manner; they are spontaneous responses by the child to Miss Martin, and in language that I think is suitable to a child the age of six years of age with respect to this type of sexual conduct....
>
> I also find that this reliability is reinforced by reviewing the statement to Detective Clark Holden, where the child is, in effect--her statements are consistent with the statements given to Leslie Martin, and also in reviewing the statements given to Dr. Pottebaum, the testimony of--the statements of the child are consistent. And that, in the Court's mind, makes the statements reliable.
>
> With respect to the reliability of the persons to whom the statements were made with respect to Miss Martin, I believe her statements are consistent with the statements that were given to the two trained police investigators in this case. They were also not suggestive. (Pre-Trial Hearing pp. 7-10)

The judge referred to the reliability of the mother, but not the child.

The Court excluded a more recent statement K.S. had made after watching a news program about a child molester (P.T. 21, 22; T. 71-80).

After the statements K.S. made, her mother called a child psychologist; he suggested she report this to the police, and she did so (T. 189-91). After the mother told a detective what K.S. had said, he interviewed K.S. for about 45 minutes; a social worker was also present; part but not all of the interview was recorded (T. 193-202). The trial judge reviewed the transcript of this interview before ruling that the two could testify to the statements K.S. made to them. (P.T. 40; T. 74) Before the recording began, K.S. was "specific" that the petitioner touched her in the living room with the television on, (on the recording, she said it was in the bedroom); she said he was wearing blue pants and a red and white shirt (but could not remember on the recording); she also said nothing came out of his penis (but could not remember on the recording).

In ruling that these witnesses could testify to the statements, the trial judge said he had reviewed the reports and:

> The Court's finding, after reviewing the statements, is that both of the reporters to whom the statements were made are trained child–trained investigators dealing with child abuse cases. The statements were tape-recorded for their accuracy. So it's the Court's finding that the people to whom the statements were made are reliable.

(T. 165).

Note that the questioners' training and the fact the questioners are reliable witnesses does not show the reliability of what the child said and only part of the interview was recorded, not the arguably most important initial portions.

> The statements were made to both individuals within a very reasonable time after the child first reported this incident to her mother. The statements were not leading or suggestive in terms of the questions being asked by Detective Holden, the child was spontaneous in her response and described her answers in language that was consistent with the child of the age of Kendra Senrick, age six, relating to sexual affairs that she described in this report.

(Ibid.).

The statement was two years after the events referred to; many of the questions were leading.

K.S. next met with a psychologist a few days later and again a week after that (T. 201-2). Again, the trial judge reviewed the witness's report, and said:

> I'm going to allow those statements to be entered, both under the statute and under Rule 803(4) of the Rules of Evidence. I believe that they--This witness is obviously a trained professional. The record reflects here that he did not lead the witness; questions were spontaneously received from him, they're consistent with the statements that were given a couple days earlier to both the child protection worker, Mr. Morrissey, and Burnsville Police Officer Clark Holden, and they have sufficient indicia of reliability, as does this witness, in reporting it and his knowing the accuracy of reporting that accurately in his reports.

(T. 113-114).

After the trial, this Court decided Idaho v. Wright, discussed below; Mr. Dolny filed a petition for post-conviction relief in the Minnesota trial court on this and other grounds. The trial judge reaffirmed his rulings allowing the out-of-court statements, saying these were

> properly admitted pursuant to Minnesota Statute § 595.02, subd. 3, and in full compliance with Petitioner's rights under both the Minnesota and United States Constitution.

In a memorandum incorporated and made a part of this order he added:

> The trial court also found that these statements were reliable because the child consistently gave the same statements to her mother, Mr. Pottebaum, Detective Holden and Child Protection Worker Morrissey and that this consistency corroborated the veracity and reliability of those statements. It appears that the majority in Idaho v. Wright has ruled that any corroboration of the statement by other evidence cannot be considered by the trial court in determining whether that statement bears a particularized guarantee of trustworthiness. This restriction improperly narrows the focus that the trial court may use in evaluating the reliability and trustworthiness of the hearsay statements. Indeed, it creates a situation whereby the trial court, in determining whether the out-of-court statements were particularly reliable, cannot consider a subsequent inconsistent statement made by the child declarant at a later date. The trier of fact, in evaluating the credibility of that witness's testimony at trial, would be allowed to

> consider that subsequent inconsistent statement. See Crim. JIG 3.15. It appears that the dissent in Idaho v. Wright is more compelling than the majority opinion.

(Order of Trial Court, December 20, 1990, emphasis added, Appendix.)

The Minnesota Court of Appeals, in an unpublished opinion affirmed on June 25, 1991, saying as to these issues:

> Dolny argues the trial court improperly considered corroborative trial evidence in deciding to admit three hearsay statements of the victim. We disagree. The record demonstrates the trial court considered (a) the timing of the child's report, (b) the spontaneity of the statements, (c) the use of leading questions by the questioner, (d) the child's use of age-appropriate language, (e) whether the statements were consistently repeated, and (f) the child's lack of a motive to fabricate. Under these circumstances, the trial court considered only appropriate reliability factors in determining to admit the three hearsay statements. In addition, the statements made to the child psychologist were also admissible under Minn.R.Evid. 803(4). See In re Welfare of R.T., 364 N.W.2d 884, 886-87 (Minn. App. 1985); see also State v. Edward Charles L., 398 S.E.2d 123, 136 (W. Va. 1990). Because the trial court did not improperly consider corroborative evidence, there was no error in admitting the child's out-of-court statements under Minn.Stat. § 595.02, subd. 3. Considering the totality of the circumstances surrounding the making of the statements, the statements were sufficiently reliable to be admissible pursuant to the statute.

(State v. Dolny, No. C5-91-23, Minn.Ct.App., June 25, 1991, pp. 2-3, Appendix.)

Upon the petition under 28 U.S.C. §2254, the United States District Court Judge held a due process claim procedurally barred, and ruled that confrontation was not violated "because complainant testified during this case and was cross-examined by defense counsel." (Appendix)

The Eighth Circuit Court of Appeals affirmed. (Appendix.)

REASONS FOR GRANTING THE PETITION

This Court decided Idaho v. Wright, 497 U.S. 805 (1990), after the trial but before the post-conviction hearing and appeal; therefore, the courts below considered the application of that decision, which held inadmissible (without a particular showing of reliability) under the residual exception to the hearsay rule a child's statements to a pediatrician. (The decision in White v. Illinois, 502 U.S. ___, 112 S.Ct. ___, 116 L.Ed.2d 848 (1992), holding similar statements to a doctor admissible under the medical treatment exception to the hearsay rule, an issue not addressed in Idaho v. Wright, came later.) The majority in Idaho v. Wright (Justices O'Connor, Brennan, Marshall, Stevens and Scalia), held that an out-of-court statement by an unavailable witness is admissible and not in violation of the confrontation clause only if it falls within a "firmly rooted" exception to the hearsay rule (which it held the residual exception is not), or when it is supported by "a showing of particularized guarantees of trustworthiness," quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980). This is because such statements are "presumptively unreliable and inadmissible for confrontation clause purposes," quoting Lee v. Illinois, 470 U.S. 530, 543 (1986). Requiring an examination of all the circumstances in which a challenged statement was made, the Idaho v. Wright Court held that

> the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief.

497 U.S. at 819. The burden is on the proponent of the statement, and the showing may not include other evidence tending to corroborate the statement. The Court said:

> Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the confrontation clause requires exclusion of the out-of-court statement.

497 U.S. at 821. (emphasis added). Or, put another way,

> To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.

497 U.S. at 822. (emphasis added).

Cautioning that it intended to create no exclusive inventory of considerations bearing on reliability under this test, the Court commented on several factors: First, the Court below had noted that the interview was not recorded on videotape, leading questions were used, and the questioner had a pre-conceived idea of what the child should disclose; these, the Supreme Court said, may bear on reliability but cannot be endorsed as an "artificial litmus test." 497 U.S. at 819. The Court then turned to other factors the state and federal courts have properly identified:

Spontaneity (though this may be undermined if there is prior interrogation or prompting), consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of similar age, lack of motive to fabricate. 497 U.S. at 821, 826. The Court also said inability to communicate to the jury at the time of trial may be relevant to trustworthiness. 497 U.S. at 824. These and other appropriate factors may be used to answer the central question of whether in a given case there are adequate "particularized guarantees of trustworthiness" to demonstrate "the child declarant was particularly likely to be telling the truth when the statement was made." 497 U.S. at 822. Applying these criteria, the Court found "no special reason for supposing the incriminating statements were particularly trustworthy." 497 U.S. at 826. (emphasis added).

This is not a quality easily shown or to be established by casual enquiry, because the harm that may be done "poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment." 497 U.S. at 824, quoting Lee v. Illinois, supra.

(White v. Illinois, 502 U.S. ___ (1992), held that statements made for medical treatment and spontaneous declarations are firmly rooted hearsay exceptions with attendant guarantees of reliability, which do not require a showing that the witness is unavailable.)

The child's statements in the present case do not carry particularized guarantees of accuracy:

1. They were not promptly made, but came nearly two years after the alleged events.

2. They were not spontaneous but came initially at a time when the child herself was in trouble, when her mother, at that traumatic and intimidating moment, accused her of "keeping"

something from her. She was "afraid" and "crying," and the statements did not come all at once but in response to further questioning.

3. The child knew her mother and Mr. Dolny had separated and divorced, and she was "upset" with him and "glad" her mother divorced him, and she did not want them to get back together, making Mr. Dolny a natural target of accusation.

4. The child was then questioned by a police officer and a social worker, who had been told by the mother what the child had said, which gave them a preconceived notion of what they expected to hear.

5. This interview was not videotaped but was selectively audiotaped--the earlier parts of the questioning (apparently a sort of rehearsal) were not recorded, and the recording was interrupted at one crucial point.

6. Many of the questions were leading.

7. The statement to the police contained at least one admitted lie--that the events took place in the living room rather than the bedroom; the child admitted she lied, because she was afraid of the questioners (i.e., at least in this instance, afraid of telling the truth).

8. The questioners used "anatomically correct dolls," which commentators, including then Chief Judge Lay of the Eighth Circuit, have recognized may by their suggestiveness diminish rather than enhance trustworthiness and create distorted recollection. See United States v. Spotted War Bonnet, 933 F.2d 1471 (8th Cir. 1991).

9. The child psychologist spoke with the child after these suggestive interrogations; he, too, used dolls; he, too, knew what the mother told him the child had said.

10. The statements were not consistently repeated but varied a good deal.

11. Often the language she used was suggestive of calculation; she even told the police, when asked what her mother had told her to say, "I didn't practice or anything", suggesting she was repeating a phrase she had been told. Similarly, there is something unnatural in the child's statement that her mother told her "to tell the whole truth."

12. There was no medical or other physical evidence of the crime.

The out-of-court statements, therefore, were replete with defects and dangers, signaling their unreliability, reinforcing the presumption of unreliability, and they showed no particular signs of trustworthiness. The trial judge found to the contrary. As to the statements to the mother, he said: That they were repeated in a "reasonable time" (in fact, it was nearly two years after the alleged events); that "given the nature of the offense" and "the age of the child" the questions were not leading or suggestive (in fact, the mother could not recall most questions she asked; the nature of offense and age of the child are not relevant to whether the questioning was suggestive); that the statements were "spontaneous" (in fact, the accusations came when the child herself was in trouble and were not spontaneous but in response to the mother's demands that she tell what other things she was "keeping from her"; that the language was suitable to a child of six years (there was no evidence as to what is "suitable" nor did

the judge indicate what criteria be applied to reach this conclusion); and the statements are "consistent" with other statements "and that, in the Court's mind, makes the statements reliable."

Here the judge invokes external, corroborating evidence, not part of the circumstances of the statements themselves--precisely what the Court in Idaho v. Wright said must not be done.

The judge found: That the police were trained investigators (which if anything tends to give them a preconceived idea of what they expected to hear); that the statements were tape recorded (in fact, only the latter part was recorded after the events had been already discussed, and even then the recording was interrupted); that the statements were made in a reasonable time after the child told the mother (but that is irrelevant; it was nearly two years after the alleged events); that the questions were not leading (in fact many were); that the statements were spontaneous (in fact nothing in the statement is spontaneous--part in fact was admittedly calculatedly false, because the child was afraid of the questioner); that the language was consistent with that of a child her age; and that she had no motive to fabricate (in fact she admittedly fabricated where the alleged events took place because she was afraid of the questioner; and this is a much less compelling motive to fabricate than she had in accusing Mr. Dolny, whom she apparently did not like).

As to the psychologist, the judge found the statements admissible under the medical exception of Minnesota Evidence Rule 803(4) and also because the questions were not leading, the "questions were spontaneously received from him" (sic) (an apparently meaningless pronouncement), and they were consistent with statements given earlier.

In his post-conviction order, the trial judge acknowledged that it "appears" the majority in Idaho v. Wright held such corroboration could not be used, but he rejected the majority's

reasoning because in his opinion it "improperly narrows the focus of what the trial court may use," and therefore "the dissent in Idaho v. Wright is more compelling than the majority opinion."

State judges, it should go without saying, are not free to reject the pronouncements of this Court on issues of federal constitutional law. Rarely if ever does one see a more brazen example of precisely that. The confrontation clause was declared applicable to the states as long ago as Pointer v. Texas, 380 U.S. 400 (1965), has been applied many times since, and was in fact applied to a state court in Idaho v. Wright itself. Remarkably the Minnesota Court of Appeals, reviewing this unfortunate performance, simply exacerbated the problem by flatly misstating the record: "The trial court considered only appropriate reliability factors," and "did not improperly consider corroborative evidence." This, obviously, is belied by the trial judge's own very explicit words.

It is precisely to correct misuses and distortions of federal constitutional law such as this that federal courts exercise their habeas corpus powers. Otherwise there would be no protection for federal constitutional rights from assault in the state courts, no barrier indeed to anarchy.

One other factor requires attention. In United States v. Spotted War Bonnet, 933 F.2d 1471 (8th Cir. 1991), the panel majority affirmed a conviction which had been remanded for reconsideration under Idaho v. Wright. The statements in question were by two children to a social worker and a clinical psychologist. Noting that Idaho v. Wright was apparently "at odds" with a number of Eighth Circuit cases upholding trial court's discretion, the majority nevertheless affirmed, noting first that here the child witnesses testified, unlike Wright, and were cross-examined, though recognizing that mere presence of a witness may not satisfy the confrontation clause if "an opportunity

for effective cross-examination" is not afforded. 933 F.2d 1474, citing Delaware v. Fensterer, 474 U.S. 15 (1985).

Chief Judge Lay dissented (and would also have granted hearing en banc), saying the majority "sidesteps" the mandate of Wright for testing reliability. Noting that this Court knew the witnesses testified when it granted certiorari and remanded, 933 F.2d at 1475, footnote 1, Chief Judge Lay would have held that even assuming arguendo the witnesses were "available" the reliability of the out-of-court statements must be evaluated and, doing this, he found no adequate indicia of reliability. 933 F.2d at 1476, footnote 2. He noted that the "need to ensure reliability is underscored by the fact that there is no medical evidence to support the allegations that either child was abused," 933 F.2d at 1476 (emphasis in original), just as there was not in the present case; and Chief Judge Lay reviewed other factors tending to show a "strong possibility that a false memory was created" by the manner in which their statements were developed, including use of anatomically correct dolls by a prosecution doctor, which "may cause permanent memory alteration," and give a "false impression" the results are "scientific." 933 F.2d at 1477.

On the question of confrontation itself, Chief Judge Lay said:

> The key to ascertaining whether suggestive procedures foreclose effective cross-examination is to determine whether the goals of confrontation can be achieved with regard to the witness. The three procedural benefits of confrontation are 1) testimony sworn under oath, 2) the jury's ability to observe the witness's demeanor, and 3) cross-examination. See Greene, 399 U.S. at 158, 90 S.Ct. at 1935. The value of the oath and observation of the witness's demeanor is significantly diminished when the

witness's memory has been altered, for the witness then has a sincere belief in her testimony.

933 F.2d at 1478-9.

Drawing an analogy to witnesses who have been hypnotized, he emphasized that "the confrontation clause is more than a simple preference for live testimony," and "mandates an enquiry into reliability in this situation" because here "the circumstances require some enquiry into the reliability of out-of-court statements irrespective of the technical availability of the declarant," and to apply a "general rule of availability" as the majority does "makes mockery of the principles behind the confrontation clause." 933 F.2d at 1480.

Next, in United States v. Balfany, 965 F.2d 575 (8th Cir., 1992), another panel affirmed a sexual conduct conviction. Even though the complaining child witness testified at trial and "was subject to meaningful cross-examination," however, the Court examined the admissibility of out-of-court statements and found error (though harmless) in allowing the testimony of one witness.

The Court held that the witness, who (like the mother here) was not trained in interviewing children, "was neither more probative than other available evidence nor sufficiently trustworthy," despite the fact that this was the first person the alleged offense was reported to and despite the apparent use of "age-appropriate language," because the witness's testimony "never established that she questioned S.N. in a non-suggestive manner," (again as with the mother here), citing Idaho v. Wright.

This decision, then, clearly indicates that judges should and will review reliability of out-of-court statements even though the witness testifies at trial and is in fact subject to cross-examination. In this respect, Balfany goes even beyond Chief Judge Lay's dissent in Spotted War Bonnet. (In the present case, neither the

trial judge nor the Minnesota Court of Appeals relied on the fact the witness testified in rejecting the confrontation claims.)

In the trial, an additionally prejudicial anomaly and constitutional difficulty was interjected with the child, having begun her testimony, reacted to questions about Mr. Dolny, and her testimony was then completed by videotape. In her direct and cross-examination, she remembered little. Compare United States v. Owens, 484 U.S. 554 (1988) (hearsay of identification by witness with loss of memory) and California v. Greene, 399 U.S. 149 (1970) (loss of memory may prevent cross-examination); see also Delaware v. Fensterer, 474 U.S. 15 (1986) (expert's loss of memory as to basis for opinion).

In Coy v. Iowa, 487 U.S. 1012 (1988), the court held the confrontation clause was violated by the use of a screen in the courtroom to prevent the witness from seeing the defendant during her testimony. Maryland v. Craig, 497 U.S. 836 (1990) approved testimony by closed-circuit television after a showing of necessity.

The Craig court held that testimony by closed-circuit television may be permissible under the confrontation clause only when a three-part case specific finding is made after an adequate enquiry that 1) the child's welfare requires it, 2) the child's ability to testify is affected not by the trauma of the courtroom setting in general but specifically by the presence of the accused, and 3) the emotional distress must be more than de minimus or "mere nervousness or excitement or some reluctance to testify." This is because, as the court had only recently recognized in Coy, supra, that:

> It is always more difficult to tell a lie about a person 'face to face' than 'behind his back' .... That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it

may confound and undo the false accuser, or reveal the child coached by a malevolent adult. Coy, supra, 487 U.S. at 1019-20.

Here, the testimony was partly live, partly by videotape (not live closed-circuit television), the change being made because of the child's reaction to questions about the defendant. The specific issues that may have been raised by Coy and Craig were not argued to the trial court or on appeal, and accordingly these were not raised in this proceeding as such, but the way in which the child's testimony was presented is obviously relevant to the question of whether the error in receiving the out-of-court statements was harmless. See Delaware v. Van Arsdall, 475 U.S. 673 (1986) (harmless error test applied to confrontation situations).

In Ring v. Erickson, 983 F.2d 818 (8th Cir. 1992), the Court reversed denial of habeas corpus relief in a case strikingly similar to the present case, involving a conviction for criminal sexual conduct with children, because of the use of video-taped statements of the complainants. An interview with a doctor was held not to be shown to be within the medical exception of White, supra, because the mother sought out the doctor, not the child, who was not shown even to have known she was talking to a doctor. 983 F.2d at 820. A statement to a social worker was held not admissible under Minn. Stat. § 595.02, subd. 3, which is not a "firmly rooted exception," because there was no adequate showing of indicia of reliability and the trial court relied in part on corroborative evidence. 983 F.2d at 821. Without specifying what they were, the Court noted the trial court had "listed many factors that it found supported the reliability of the statement," but nevertheless found them inadequate. Id.

The present decision of the Court of Appeals relies principally upon the fact that the child testified and was available

and subject to cross-examination. The authorities leave doubt and confusion as to the function and effect of "availability" of the witness in confrontation situations.

Therefore, this case presents several important and related points concerning confrontation which it would be most beneficial for this Court to resolve: How "availability" affects the criteria by which the reliability and admissibility of out-of-court statements are judged; and whether a trial judge's ruling based largely on improper "corroboration" can be upheld because the witness was subject to cross-examination, especially where the trial judge explicitly disapproved a decision of this Court on the use of corroboration.

CONCLUSION

For these reasons we respectfully pray that the petition for a writ of certiorari be granted.

Respectfully submitted,

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November 17, 1994

APPENDIX

PAGE

Decision of the Court of Appeals A-1

Order of the District Court A-13

Unpublished Opinion of Minnesota Court of Appeals A-16

State Court Order Denying Post-Conviction Relief A-20

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-2904MN

Keith Richard Dolny,	*	
	*	
Appellant,	*	
	*	On Appeal from the United
v.	*	States District Court
	*	for the District of
	*	Minnesota.
Robert A. Erickson, Warden,	*	
	*	
Appellee.	*	

Submitted: May 10, 1994

Filed: August 19, 1994

Before RICHARD S. ARNOLD, Chief Judge, LIVELY,* Senior Circuit Judge, and FAGG, Circuit Judge.

RICHARD S. ARNOLD, Chief Judge.

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*The Hon. Pierce Lively, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

Keith Richard Dolny was convicted of criminal sexual assault against his former stepdaughter, K.S., in Minnesota state court, and sentenced to 43 months in prison. He filed a direct appeal and an appeal from the trial court's refusal to grant post-conviction relief. The Minnesota Court of Appeals consolidated his claims then rejected them. Dolny did not seek review in the Minnesota Supreme Court; instead, he sought federal habeas corpus relief under 28 U.S.C. § 2254. A magistrate judge recommended that the petitioner's claim be denied,[1] and the District Court[2] agreed. Dolny now appeals to this Court.

The petitioner claims that his Sixth Amendment Confrontation-Clause rights were violated by the introduction of out-of-court statements made by K.S. Dolny contends that these hearsay statements were introduced without sufficient findings as to their reliability and without opportunity for effective cross-examination of the child, whose testimony was presented by videotape.[3] The state replies that Dolny is procedurally barred from asserting his claims, and that, in any event, the trial court's reliability findings were sufficient, particularly given that the child testified in detail and was subject to questioning by petitioner's trial counsel. We conclude that we may properly consider Dolny's claims on the merits, but affirm the District Court's denial of relief.

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[1] The Hon. Jonathan Lebedoff, United States Magistrate Judge for the District of Minnesota.

[2] The Hon. Diana E. Murphy, Chief Judge, United States District Court for the District of Minnesota.

[3] Dolny does not challenge the introduction of K.S.'s videotaped testimony per se (because he failed to do so in the state courts), but contends that the way in which the child's testimony was presented is relevant to the issue of whether receiving the out-of-court statements into evidence was harmless error.

I.

The hearsay statements which are the subject of this appeal consist of comments made by the child to four individuals who appeared as witnesses at the trial: her mother, Ms. Leslie Martin; her treating psychologist, Dr. Randall Pottebaum; a police officer, Detective Clark Holden; and a county child-protection worker, Mr. Rick Morrissey. These comments, some recorded on audiotape, were made when K.S. was six years old. The statements alleged acts of abuse committed by Dolny on K.S. when the child was four.

Before the statements were allowed into evidence, K.S. testified;[4] she appeared first in a pre-trial hearing, then briefly in front of the jury, and, finally, by means of videotape (because she was afraid of Dolny and, to a lesser extent, the jurors). At trial, on direct examination, K.S. initially did not recall many significant details of the abuse, other than Dolny's having sat on her and threatened her. She could not remember how many times the abuse occurred, whether it hurt, how long the incident or incidents lasted, or how much clothing either she or Dolny were wearing. She testified that she remembered talking to her mother and to the police, but she could not remember what she had said to the police until she saw her statement. Eventually, after reading a portion of her statement to the police, she testified in some detail about the incidents of abuse. K.S. also explained why she had given conflicting statements about where the abuse took place within the residence, and why she waited as long as she did to tell anyone.

On cross-examination, defense counsel began by asking K.S. what had happened to her two front teeth; she replied that she had lost them and had put them under her pillow for the tooth fairy. She agreed that it had been a long time since

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[4] By this time the child was seven years old. Pre-trial Tr. 3.

she lived with Dolny. Counsel asked her how many bedrooms and bathrooms there had been in the residence, and whether K.S. had ever bathed with her older brothers, which the child denied. When asked if she goes to see her father, K.S. said that she did and that she enjoyed doing so. Counsel then asked K.S. about her mother's work, and asked who took care of K. S. -- then and now -- in her mother's absence (during the period of alleged abuse it was Dolny; now it is her brothers). K.S. was then asked if she knew a man named Buzz, and if he was a friend of her mother's; the child answered affirmatively.

Upon further questioning, K.S. agreed that she had spoken with Detective Holden and social worker Morrissey, as well as her mother, about the events to which she had testified. However, she denied having spoken about the abuse to her father. K.S. indicated that she had talked with the prosecutor approximately three times. Finally, defense counsel asked K.S. whether she had bad dreams about Keith doing something to her brothers, to which she replied that she did, and that the dreams included her. She agreed that dreams are not real, but that sometimes she believes them, and they scare her.

Subsequently, during the course of the trial, the Court ruled on the admissibility of the contested statements. The judge made individual findings concerning the reliability of each, prior to its admission. To a large extent, the judge looked to the reliability of the hearsay witness, as opposed to the child's statement, and also considered the consistency among the various statements. In each instance, for substantially similar reasons, the statements were admitted.

II.

Minnesota urges us to reject Dolny's claim without reaching the merits. For its principal reason, the state points to the statute setting out federal habeas corpus remedies,

which provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). Minnesota contends that Dolny is guilty of procedural default, because he did not seek review in the Minnesota Supreme Court, and the time for seeking such review has expired. The magistrate judge, on the other hand, ruled that Dolny was required to pursue only his appeal as of right, and did not have to petition for review by Minnesota's highest court, because such review is discretionary. Minn. R. Civ. App. P. 117, subd. 2.

The question of whether a criminal defendant must seek discretionary review from a state's highest court prior to requesting federal habeas relief remains open in this circuit, although we have strongly hinted that such effort is not necessary. Evans v. Dowd, 932 F.2d 739, 740-41 (8th Cir.), cert. denied, 112 S. Ct. 385 (1991); Brown v. Armontrout, 898 F.2d 84, 86-87 & n.5 (8th Cir.), cert. denied, 498 U.S. 868 (1990). Other circuits are split. Compare Jennison v. Goldsmith, 940 F.2d 1308, 1310 (9th Cir. 1991) (per curiam) (petitioner must seek discretionary review in Arizona state courts; "the right to raise" an issue does not entail a right to have that issue considered on its merits) and Richardson v. Procunier, 762 F.2d 429, 431-32 (5th Cir. 1985) (petitioner must seek discretionary review in the Texas Court of Criminal Appeals) with Buck v. Green, 743 F.2d 1567, 1569 (11th Cir. 1984) (for purposes of § 2254, Georgia defendant who lost appeal as of right need not petition the Georgia Supreme Court for certiorari, given that court's limited jurisdiction).

In Buck, the Eleventh Circuit noted that "the Supreme Court of Georgia does not ordinarily review assignments of error from a judgment of the Court of Appeals," and so did not offer a practical remedy to the petitioner. 743 F.2d at 1569. The Eleventh Circuit then pointed out that § 2254's

requirements "'are rooted in the doctrine of comity,'" and therefore should not be interpreted so as "'to burden the state system with meaningless petitions for relief to forums which are not intended by state law to consider them.'" Id. at 1569, quoting Williams v. Wainwright, 452 F.2d 775, 777 (5th Cir. 1971). Here, the right of a petitioner to have his claim considered by Minnesota's Supreme Court is unquestionably restricted. See Minn. R. Civ. App. P. 117, subd. 2. ("Review of any decision of the Court of Appeals is discretionary with the Supreme Court. Limited, though non-exclusive, criteria are prescribed for determining which cases to review.[5] In practice, less than 25% of petitions for review are granted.

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[5] Discretionary Review. Review of any decision of the Court of Appeals is discretionary with the Supreme Court. The following criteria may be considered:

(a) the question presented is an important one upon which the Supreme Court should rule; or

(b) the Court of Appeals has ruled on the constitutionality of a statute; or

(c) the lower courts have so far departed from the accepted and usual course of justice as to call for an exercise of the Supreme Court's supervisory powers; or

(d) a decision by the Supreme Court will help develop, clarify, or harmonize the law; and

(1) the case calls for the application of a new principle or policy; or

(2) the resolution of the question presented has possible statewide impact; or

(3) the question is likely to recur unless resolved by the Supreme Court.

Minn. R. Civ. App. P. 117, subd. 2.

Popovich and Miller, Obtaining Review in the Minnesota Supreme Court, 14 Hamline L. Rev. 117, 128 (1990). Thus, the practice in Minnesota is similar to that in Florida, where the Court of Appeals decision is usually "the end of the road." Williams v. Wainwright, 452 F.2d at 776.

We believe that "[t]he right . . . to raise" an issue referred to in § 2254 means more than a mere opportunity to seek leave to present an issue; it means a realistic, practical chance to present an issue and have it considered on the merits. Furthermore, we agree with the Eleventh Circuit that concerns of comity are best met by not requiring fruitless and burdensome petitions. An analogy may be found in Fay v. Noia, 372 U.S. 391, 435 (1963), which dispensed with the requirement that petitioners had to seek certiorari from the United States Supreme Court before going into federal habeas (overruling Darr v. Burford, 339 U.S. 200 (1950)). Thus, we hold that, given the limited jurisdiction of the Minnesota Supreme Court, when a petitioner has presented his claims to the State's Court of Appeals, the petitioner need not take the additional step of seeking discretionary review prior to requesting federal habeas relief. When Dolny presented his claims to the Minnesota Court of Appeals, he afforded "the State a full and fair opportunity to address and resolve the claim on the merits." Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1720 (1992). Therefore, the District Court was correct in concluding that Dolny could proceed with his petition for habeas corpus relief.[6]

Minnesota also contends that Dolny is procedurally barred under Coleman v. Thompson, 501 U.S. 722 (1991), because

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[6] Our decision in Kolocotronis v. Holcomb, 925 F.2d 278 (8th Cir. 1991) does not preclude this result. In that case the only issue before the court was whether the petitioner must continually seek his freedom from a state hospital for habeas corpus exhaustion purposes, or whether one attempt would suffice. The need to seek discretionary review was not at issue, and language in the opinion on this subject is dictum.

he did not raise the Sixth Amendment Confrontation Clause issue in the Minnesota Court of Appeals. Even if an issue does not appear on the face of the pleadings, however, the issue is not barred from consideration if it was decided by the court. See Ulster County Court v. Allen, 442 U.S. 140 (1979). In its order denying post-conviction relief, the trial court explicitly ruled that "out-of-court statements made by the six-year-old victim in this case . . . were legally and properly admitted pursuant to Minnesota Statute § 595.02, subd. 3, and in full compliance with Petitioner's rights under both the Minnesota and United States Constitution." (Emphasis supplied.) The trial court's order was accompanied by a memorandum referring to Idaho v. Wright, 497 U.S. 805 (1990), a Sixth Amendment Confrontation Clause case. Next, the Minnesota Court of Appeals held that the evidence was properly admitted; the opinion referred to reliability factors discussed in Wright and adopted by State v. Lanam, 459 N.W.2d 656 (Minn. 1990), cert. denied, 498 U.S. 1033 (1991). Thus, even if Dolny did not expressly invoke the Sixth Amendment, the Minnesota courts considered the issue, and he is not precluded from pursuing it here.

Finally, the State contends that Dolny failed to allege actual prejudice from any trial error. See Brecht v. Abrahamson, 113 S. Ct. 1710 (1993). However, in his brief, Dolny asserts that his conviction "is based entirely on out-of-court statements, of no demonstrated reliability, by hearsay witnesses and videotape." Appellant's Br. 35 (emphasis original). This statement is a sufficient allegation of prejudice. Having rejected the State's procedural contentions, we now assess Dolny's substantive claims.

III.

Dolny contends that the trial. court violated his Sixth Amendment Confrontation Clause rights by admitting the hearsay statements. As this court held in United States v. Spotted War Bonnet, 933 F.2d 1471 (8th Cir. 1991), cert. denied, 112 S. Ct. 1187 (1992), where out-of-court statements are admitted pursuant to a hearsay exception, and the declarant also testifies, the Confrontation Clause inquiry is whether the trial provided an opportunity for effective cross-examination. Id. at 1474-75.[7]

The petitioner argues that this Court's decision in United States v. Balfany, 965 F.2d 575 (8th Cir. 1992), stands for the proposition that, even if the child testifies herself, the court must make reliability determinations just the same as when the child does not appear. The petitioner reads Balfany too broadly. The relevant portion of Balfany held that hearsay statements made by a complaining child were simply not admissible under the residual hearsay exception of the Federal Rules of Evidence, Fed. R. Evid. 803(24). 965 F.2d at 581-82.[8] The petitioner does not appear to contest the trial court's finding that the evidence satisfied the relevant Minnesota evidence statute, Minn. Stat. § 595.02, subd. 3.[9] Therefore,

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[7]Because the child testified, neither Idaho v. Wright, supra, nor Ring v. Erickson, 983 F.2d 818 (8th Cir. 1993), is applicable.

[8]The defendant, however, was not entitled to reversal because the Court concluded that the error was harmless. 965 F.2d at 582.

[9]The trial court's findings on reliability might not have satisfied Idaho v. Wright, in the absence of the child's testimony, because the findings focused on the reliability of the persons to whom the child spoke rather than on the reliability of the child herself. However, these findings appear to have been in conformity with the requirements of the Minnesota statute, which provides as follows:

the only question before us is whether the Confrontation Clause has been violated. Spotted War Bonnet controls.

We are mindful that "simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns." Spotted War Bonnet, 933 F.2d at 1474. On the other hand, "a perfectly satisfactory cross-examination is not required by the Clause, and a witness who cannot remember the details of statements she has made in the past can still be sufficiently available for cross-examination to satisfy the constitutional requirement." Ibid. In fact "a witness's inability to 'recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which [an out-of-court] statement was given, does not have Sixth Amendment consequence.'" Ibid., quoting United States v. Owens, 484 U.S. 554, 558 (1988). The key question is whether there is "an opportunity for effective cross-

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Certain out-of-court statements admissible. An out-of-court statement made by a child under the age of ten years . . . alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse of the child . . . by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:

(a) the court or person authorized to receive evidence finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the child . . . testifies at the proceedings . . . and

(c) the proponent of the statement notifies the adverse party . . . sufficiently in advance . . .

Minn. Stat. Ann. § 595.02, subd. 3 (1988).

examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Ibid. (citations omitted) (emphasis original).

In the course of Dolny's trial, the child testified in court, and defense counsel cross-examined her at length. Counsel queried K.S. on several subjects potentially bearing on the child's credibility as well as potential theories for exculpation, including whether K.S. bathed with her brothers, whether K.S. had ever discussed the incidents with her father, and whether the child had spoken with any of the witnesses about the alleged abuse. Moreover, defense counsel established that it had been quite a long time since the alleged incidents occurred, that K.S. visits her father, and that her mother had a friend named Buzz. K.S. also stated she had spoken with the prosecutor on three separate occasions prior to trial. Prompted by defense counsel, K.S. acknowledged that she believes in the tooth fairy, and that she believes her dreams, which scare her. In general, the transcript indicates the child's answers were responsive and coherent.

During cross-examination, the defense did not ask K.S. to testify, to any substantial degree, on the acts of abuse themselves. However, such territory would have been well within the scope of the prosecution's direct examination. Despite her initial difficulties in remembering details, ultimately K.S. testified extensively on the abuse. Apparently defense counsel elected to use the cross-examination as a means to discredit K.S. generally, rather than pick apart specific allegations. This, however, is a matter of trial strategy; it does not demonstrate that Dolny lacked an opportunity for effective cross-examination. We hold that Dolny's Sixth Amendment Confrontation Clause rights were not violated by the introduction of the evidence of out-of-court statements made by the child victim.

IV.

The judgment of the District Court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Keith Richard Dolny,

Petitioner, Civ. No. 4-92-618

v.

Robert Erickson, Warden,
Minnesota State Prison,

ORDER

Respondent.

This matter comes before the Court upon the report and recommendation of United States Magistrate Judge Jonathan Lebedoff. Petitioner is a prisoner at the Minnesota Correctional Facility in Stillwater, Minnesota. Following a jury trial, petitioner. was convicted of two counts of first degree criminal sexual conduct in violation of Minn. Stat. § 609.342, and was sentenced to a term of imprisonment of 43 months. The Minnesota Court of Appeals affirmed his conviction on June 17, 1991. Petitioner then filed this application for a writ of habeas corpus under 28 U.S.C. § 2254. The case was referred to United States Magistrate Judge Jonathan Lebedoff for report and recommendation pursuant to 28 U.S.C. § 636 and District of Minnesota Local Rule 72.1(c) (1).

The magistrate judge recommended that the petition for writ of habeas corpus be denied. He concluded that petitioner's due process claim is procedurally barred and that petitioner has not shown cause and prejudice to excuse his procedural default. He also concluded that the admission of

complainant's out of court statements did not violate the confrontation clause of the sixth amendment to the United States Constitution.

Petitioner objects to the findings in the report and recommendation that he is barred from addressing the merits of the procedural due process claim. He also objects to the finding that his rights under the Confrontation Clause of the Sixth Amendment were not violated.

Upon the filing of objections to a report and recommendation, the court must "make a de novo determination of those portions . . . to which objection is made." 28 U.S.C. § 636 (b)(1). After the court's de novo review of the entire record, it finds itself in basic agreement with the findings and conclusions of the magistrate judge.

Petitioner's due process claim is procedurally barred because he did not present it to the Minnesota Court of Appeals, Case v. State, 364 N.W.2d 797 (Minn. 1985), and he has not shown cause and prejudice to excuse his procedural default. See Coleman v. Thompson, 111 S.Ct. 2546, 2565 (1991). Furthermore, the admission of the testimony of other witness about the complainant's statements to them did not violate the confrontation clause of the Sixth Amendment because the complainant testified during this case and was cross-examined by defense counsel.

ORDER

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that petitioner's application for writ of habeas corpus under 28 U.S.C. § 2254 is denied. -

Date: 6/18/93

s/s

Diana E. Murphy
Chief Judge

This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (1990).

STATE OF MINNESOTA

IN COURT OF APPEALS

C5-91-23

Dakota County — Short, Judge

Keith Richard Dolny,
petitioner,

Appellant,

Peter A. Cahill
Colich & Cahill
420 Lumber Exchange Building
10 S. Fifth Street
Minneapolis, MN 55402

vs.

State of Minnesota,

Respondent.

Hubert H. Humphrey, III
Attorney General
Second Floor, Ford Building
117 University Avenue
St. Paul, MN 55155

James C. Backstrom
Dakota County Attorney
James M. Crow
Assistant County Attorney
1560 West Highway 55
Hastings, MN 55033

Filed: June 25, 1991
Office of Appellate Courts

Considered and decided by Short, Presiding Judge, Forsberg, Judge, and Schumacher, Judge.

UNPUBLISHED OPINION

SHORT, Judge

Keith Richard Dolny was found guilty in a jury trial of two counts of criminal sexual conduct in the first degree. Dolny appeals from the judgment of conviction and the order denying his petition for postconviction relief. On appeal, he argues (1) the trial court erred in admitting the child's out-of-court statements pursuant to Minn. Stat. § 595.02, subd. 3 (1988), and (2) there is insufficient evidence to support the conviction. We disagree and affirm.

DECISION

I.

In determining the reliability of a child's out-of-court statements for purposes of admission under Minn. Stat. § 595.02, subd. 3, a trial court must ignore corroborative trial evidence and consider only those circumstances surrounding the making of the statements.

> These circumstances include, but are not limited to, whether the statements were spontaneous, whether the person talking with the child had a preconceived idea of what the child should say, whether the statements were in response to leading or suggestive questions, whether the child had any apparent motive to fabricate, and whether the statements are the type of statements one would expect a child of that age to fabricate.

State v. Lanam, 459 N.W.2d 656, 661 (Minn. 1990) (citing Idaho v. Wright, __ U.S. __, __, 110 S. Ct. 3139, 3149-52 (1990)), cert. denied, __ U.S. __, 111 S. Ct. 693 (1991). Courts have discretion to consider appropriate factors, as long as the factors relate to whether the child declarant was likely to be telling the truth when the statement was made. See Idaho v. Wright, __ U.S. __, __, 110 S. Ct. 3139, 3150 (1990).

Dolny argues the trial court improperly considered corroborative trial evidence in deciding to admit three hearsay statements of the victim. We disagree. The record demonstrates the trial court considered (a) the timing of the child's report, (b) the spontaneity of the statements, (c) the use of leading questions by the questioner, (d) the child's use of age-appropriate language, (e) whether the statements were consistently repeated, and (f) the child's lack of a motive to fabricate. Under these circumstances, the trial court considered only appropriate reliability factors in determining to admit the three hearsay statements. In addition, the statements made to the child psychologist were also admissible under Minn. R. Evid. 803(4). See In re Welfare of R.T., 364 N.W.2d 884, 886-87 (Minn. App. 1985); see also State v. Edward Charles L., 398 S.E.2d 123, 136 (W. Va. 1990). Because the trial court did not improperly consider corroborative evidence, there was no error in admitting the child's out-of-court statements under Minn. Stat. § 595.02, subd. 3. Considering the totality of the circumstances surrounding the making of the statements, the statements were sufficiently reliable to be admissible pursuant to the statute.

II.

Dolny also argues the evidence is insufficient to sustain his conviction. When reviewing a claim of sufficiency of the evidence, we must ascertain whether, under the facts in the

record and the legitimate inferences that can be drawn from them, a jury could reasonably conclude the defendant was guilty of the offense charged. State v. Bias, 419 N.W.2d 480, 484 (Minn. 1988). The evidence must be viewed in the light most favorable to the prosecution, and we assume the jury believed the state's witnesses and disbelieved any contrary evidence. Id.

Dolny argues the evidence is insufficient due to inconsistencies in the child's account of what occurred, the lack of corroboration, the absence of physical evidence of abuse, and the long delay between the time of the occurrence and reporting of the alleged sexual abuse. We disagree. Minor inconsistencies between a victim's testimony and previous statements do not provide grounds for reversal. See State v. Garden, 404 N.W.2d 912, 916 (Minn. App. 1987), pet. for rev. denied (Minn. June 25, 1987); see also State v. Erickson, 454 N.W.2d 624, 629 (Minn. App. 1990) (jury entitled to believe child sexual abuse victim even though her story changed over time), pet. for rev. denied (Minn. May 23, 1990). In addition, a child's allegations of sexual abuse do not require corroboration unless the other evidence is insufficient. Further, the absence of physical evidence is not controlling when the complainant's testimony is positive and consistent. State v. Myers, 359 N.W.2d 604, 608 (Minn. 1984); see also State v. Mosby, 450 N.W.2d 629, 635 (Minn. App. 1990), pet. for rev. denied (Minn. Mar. 16, 1990); Minn. Stat § 609.347, subd. 1 (1988). After a thorough review of the record, we conclude the evidence was more than sufficient to support the guilty verdicts.

Affirmed.

6-17-91 s/ Marianne D. Short

STATE OF MINNESOTA COUNTY OF DAKOTA	DISTRICT COURT FIRST JUDICIAL DISTRICT
State of Minnesota, Plaintiff, vs. Keith Richard Dolny, Respondent.	File No. K8-89-1384 ORDER DENYING REQUEST FOR POST CONVICTION RELIEF

The above-entitled matter came on for hearing before the undersigned Judge of District Court at the Dakota County Judicial Center, Hastings, Minnesota. on December 17, 1990, pursuant to Petitioner's petition for post conviction relief under Minnesota Statute §590.01, et seq. Peter A. Cahill, Esq., appeared with and on behalf of Petitioner. James Crow, Assistant Dakota County Attorney, appeared on behalf of Respondent.

Based upon the file, the Proceedings herein and the arguments of counsel and the evidence adduced at the hearing, the Court makes the following:

FINDINGS

1. During the trial Randall Pottebaum testified on behalf of the State of Minnesota as a treating psychologist and as an expert witness regarding child sex abuse. Mr. Pottebaum described himself as the Director of Sexual Assault Services for Park Nicollet Medical Center. At the post conviction hearing Mr. Greg Winkel, Clinical Manager for the Mental Health Department of Park Nicollet Medical Center produced

Mr. Randall Pottebaum's personnel file and also testified in this proceeding. After his testimony and the production of the personnel records relating to Mr. Pottebaum. Petitioner conceded that Mr. Pottebaum served in the capacity of Director of Sexual Assault Services for Park Nicollet Medical Center since August of 1987 and during Petitioner's trial herein. Therefore, Petitioner has not established any newly discovered evidence or evidence of misrepresentation on the part of the State's witness, Randall Pottebaum with respect to his credentials as an expert witness.

CONCLUSIONS OF LAW

1. The evidence adduced at the trial was legally sufficient to sustain Petitioner's conviction.

2. The admission of out-of-court statements made by the six-year-old victim in this case to her mother Leslie Martin, Mr. Randall Pottebaum, Burnsville Police Officer Clark Holden and Dakota County Child Protection Worker Rick Morrissey were legally and Properly admitted pursuant to Minnesota Statute §595.02, subd. 3, and in full compliance with Petitioner's rights under both the Minnesota and United States Constitution.

ORDER

1. Petitioner's request for relief herein pursuant to Minnesota Statute §590.01, et seq. is hereby denied.

2. Respondent's motion for an order revoking the stay of the executed sentence of the Petitioner herein on the grounds that Petitioner's appeal has been dismissed in this matter and ordering that Petitioner immediately be taken into custody and be remanded to the custody of the Department of

Corrections for the service of his sentence of 43 months in prison is denied. The execution of Petitioner's sentence herein is stayed pursuant to Minnesota Rules of Criminal Procedure 28.02, subd. 7 an the same terms and conditions as was originally stayed when the Court sentenced Petitioner herein on July 17, 1990.

3. The attached memorandum is incorporated herein and made a part of this order.

DATED: December 18, 1990

BY THE COURT:

s/s
Robert F. Carolan
Judge of District Court

MEMORANDUM

In reviewing whether the evidence is sufficient to support Petitioner's conviction, the trial court must view the evidence in the light most favorable to the verdict and assume the jury believed the witnesses for the state and disbelieved any contrary evidence. State v. Bias, 419 N.W.2d 480 (Minn. 1988); State v. Lanam, 459 N.W.2d 656 (Minn. 1990). Under this standard the trial court must conclude that the evidence is sufficient to sustain Petitioner's conviction herein. Under this standard the jury was free to believe the statements of the child victim in this case and the other state witnesses and disbelieve the testimony of the Defendant or the Defendant's witnesses.

Since the trial of this case, United States Supreme Court has ruled in the case of Idaho v. Wright. The Court ruled that incriminating statements admissible under an exception to the hearsay rule must either fall within a firmly rooted hearsay exception or be supported by a showing that under the circumstances under which the statement or statements were made there were particularized guarantees of trustworthiness to make it particularly likely that the child declarant was telling the truth when the statements were made.

Subsequently. the Minnesota Supreme Court, in State v. Lanam, supra, adopted the holding in Idaho v. Wright and reiterated that the trial court, in determining whether hearsay statements of a child witness are sufficiently trustworthy to be admitted Pursuant to Minnesota Statute §595.02, subd. 3, must focus only on those circumstances actually surrounding the making of the statements.

With respect to the hearsay statements made by the child victim to her mother, Leslie Martin, in this case, the trial court, Prior to admitting those statements, but after Ms. Martin had testified and the trial court had an opportunity to evaluate her credibility as a witness. found that the statements were

reported to Ms. Martin in a reasonable time, that questions were not asked in a leading or suggestive manner and that the child gave spontaneous responses to Ms. Martin.

With respect to the statements given to Detective Holden and Child Protection Worker Morrissey, the Court also made findings that those statements were made within a very reasonable time after the child first reported this incident to her mother, that the questions were not leading or suggestive, that the child was spontaneous in her responses and answered in language that was consistent and suitable with a child the age of the victim in this case. The Court further noted that these statements were made to trained investigators who had no motive to fabricate and that the statements were tape-recorded for their accuracy.

Ms. Martin, the child's mother, did not have any Preconceived ideas of what the child should say or was about to say when the child related to her that the Defendant had previously taken her clothes off and part of his clothes off and touched her in her private parts with both his fingers and his penis. At the time these statements were given, the child was six years of age. These are not statements that one would expect a six-year-old child to fabricate.

The trial court also found that these statements were reliable because the child consistently gave the same statements to her mother, Mr. Pottebaum, Detective Holden and Child Protection Worker Morrissey and that this consistency corroborated the veracity and reliability of those statements. It appears that the majority in Idaho v. Wright has ruled that any corroboration of the statement by other evidence cannot be considered by the trial court in determining whether that statement bears a particularized guarantee of trustworthiness. This restriction improperly narrows the focus that the trial court may use in evaluating the reliability and trustworthiness of the hearsay statements. Indeed, it creates a situation whereby the trial court, in determining whether the

out-of-court statements were particularly reliable. cannot consider a subsequent inconsistent statement made by the child declarant at a later date. The trier of fact, in evaluating the credibility of that witness's testimony at trial, would be allowed to consider that subsequent inconsistent statement. See Crim. JIG 3.15. It appears that the dissent in Idaho v. Wright is more compelling than the majority opinion.

RFC

Supreme Court, U.S.
FILED
DEC 21 1994
OFFICE OF THE CLERK

No. 94-911

In the Supreme Court of the United States

October Term, 1994

KEITH RICHARD DOLNY,

Petitioner,

vs.

ROBERT ERICKSON, Warden,
MINNESOTA STATE PRISON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

I.

Is there a confrontation clause violation of the U.S. Constitution when Petitioner was given adequate opportunity for cross examination of a young victim of a criminal sexual assault when the victim testified at trial and the trial court allowed other persons including a treating psychologist to testify to out of court statements made by the victim pursuant to Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139 (1990)?

II.

Does the United States Supreme Court have jurisdiction pursuant to U.S. Supreme Court rule 15.4 to hear a case of a habeas corpus petitioner when the petitioner has been out of custody for more than one year and the habeas corpus petitioner will have completed his parole on January 31, 1995?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

CONCLUSION 9

TABLE OF AUTHORITIES

PAGE

CASES

Carafas v. LaVallee,
391 U.S. 234, 88 S.Ct. 1556 (1968) 8

Dana v. Department of Corrections,
958 Fed. 2d 237 (1992),
cert. denied 112 S.Ct. 3043 5

Dolny v. Erickson, 32 Fed. 3rd 381 3

Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 7

Ex Parte Baez, 177 U.S. 378, 20 S.Ct. 673 (1900) 8

Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139 (1990) 4, 5

Johnson v. Hoy, 227 U.S. 245, 33 S.Ct. 240 8

Lanam v. Minnesota,
459 NW 2d 656 (1990)
cert. denied 111 S.Ct. 693 (1991), ... 5

Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923 (1989) 7

McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24 (1934) 8

Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909 ..... 7, 8

White v. Illinois, 502 U.S. _____
112 S.Ct. 736 (1992) 4, 5

UNITED STATES CODE

28 U.S.C. 2241(c) 7

28 U.S.C. 2254 ..... 3, 7

28 U.S.C. 2254(1) 6

U.S. SUPREME COURT RULES

U.S. Supreme Court Rule 15.4 ..... i, 6

U.S. Supreme Court Rule 15.1 4

STATEMENT OF THE CASE

Petitioner, Keith Richard Dolny, was convicted in Minnesota State Court of two counts of Criminal Sexual Conduct in the First Degree. As a result of that conviction, he was sentenced to 43 months in prison. The Petitioner was not required to start serving the sentence until after he lost his direct appeal. His prison term started July 1, 1991. He was released from custody in November, 1993, and his parole is due to expire January 31, 1995.

K.S., a 6-year-old girl, told her mother and investigators, testified at a pre-trial hearing, and testified at trial that when she was 4 years old, she was sexually abused and threatened by Petitioner. K.S. testified Petitioner sat on her legs, took her clothes off and put his finger in her vagina (P.T., p. 8; T.T., p. 46, 49, 123-124, 182, 298). When she cried, he would slap her (P.T., 8). Petitioner physically hurt K.S. (P.T., p. 9, 312). Petitioner told K.S. he had guns and he would shoot K.S. and kill her if she told anyone about the sexual abuse (P.T., p. 17, 23-24; T.T., p. 48-50, 52). Petitioner asked K.S. to kiss him on his private parts and he licked her private parts, referring to her vagina (P.T., p. 22, 33; T.T., p. 59-60). Petitioner tried to shove her in the oven in the kitchen to get her to cooperate with the sexual abuse and to convince K.S. not to tell (P.T., p. 23-24; T.T., p. 57, 202). K.S. had frequent nightmares that Petitioner was going to get her and was going to sexually abuse her (P.T., p. 29; T.T., p. 61-62, p. 182-186). K.S. was frightened by Petitioner (T.T., p. 52, 125). When K.S. described the sexual abuse to her mother, she was ashamed, shaky, crying and felt like she had done something wrong (T.T., p. 204). K.S. said Petitioner tried to put his penis inside of her vagina and that her vagina was wet after that. She then went to the bathroom to clean herself off (T.T., p. 259, 298). Petitioner made her touch his penis with her hands (T.T., p. 297-298). K.S. said Petitioner did these

things to her more than once, and talked about three times. She had a stronger recollection of one incident than the others (T.T., p. 293-310). Petitioner was convicted by a jury of two counts of Criminal Sexual Conduct in the First Degree. On July 17, 1990, Petitioner was sentenced to 43 months in prison. The sentence was stayed pending appeal and on July 1, 1991, the Petitioner commenced serving his sentence.

The mother of K.S. testified that she had found rotten eggs in K.S.'s room on Mother's Day, May 14, 1989 (P.T., 8). Prior to this discovery, K.S. would have a bad dream once or twice a week. The bad dream was that Petitioner was going to get her (P.T. 12). The mother told K.S. that K.S. should have told her about hiding these eggs then asked K.S. if K.S. was keeping other things from her and what K.S. was afraid of (P.T., 6-10, 33-34; T.T., 181-182). It was at this time that K.S. first told her mother about sexual abuse by Petitioner. The mother responded appropriately by first calling a child psychologist the next day and then the police (P.T., p. 13-14; T.T., p. 181-190).

Randy Pottebaum, a clinical child psychologist, testified that K.S. was anxious and frightened when talking about the abuse. Burnsville police officer Clark Holden and Dakota County Child Protection worker, Rick Morrisey, both trained investigators dealing with child abuse, took statements from K.S. that were consistent with prior statements (T.T., p. 238-240, 285). The Trial Court specifically found that K.S. did not have a motive to fabricate the sexual abuse (T. 165). The Petitioner appealed to the Minnesota Court of Appeals, which appeal was stayed pending a post-conviction relief hearing before the trial judge. After the trial judge issued his order denying any relief, the Minnesota Court of Appeals affirmed the Petitioner's convictions and the Trial Court then sentenced Petitioner to prison. Petitioner did not seek review of his conviction to the Minnesota Supreme Court even though he was entitled to seek such review. He later sought federal

habeas corpus review pursuant to 28 U.S.C. 2254. Federal magistrate Lebedoff recommended against any relief and in a de novo review, Federal District Judge Diana Murphy concurred with the magistrate. The 8th Circuit Court of Appeals in Dolny v. Erickson, 32 Fed. 3rd 381 affirmed the conviction of the Petitioner finding that there was no confrontation clause violation. The 8th Circuit did not agree with the Federal magistrate or Federal Trial Judge that the Petitioner was procedurally barred from habeas corpus consideration.

REASONS FOR DENYING THE PETITION

Pursuant to U.S. Supreme Court Rule 15.1, Respondent points out that at Page 5 of the Petition for Writ of Certiorari in two places Petitioner indicates that the police only tape-recorded part of the interview. It should be made clear that the officer who was interviewing the minor victim had an initial discussion with the victim to determine what had occurred and once the officer determined what happened, he then took a formal tape-recorded statement.

I. IS THERE A CONFRONTATION CLAUSE VIOLATION OF THE U.S. CONSTITUTION WHEN PETITIONER WAS GIVEN ADEQUATE OPPORTUNITY FOR CROSS EXAMINATION OF A YOUNG VICTIM OF A CRIMINAL SEXUAL ASSAULT WHEN THE VICTIM TESTIFIED AT TRIAL AND THE TRIAL COURT ALLOWED OTHER PERSONS INCLUDING A TREATING PSYCHOLOGIST TO TESTIFY TO OUT OF COURT STATEMENTS MADE BY THE VICTIM PURSUANT TO IDAHO V. WRIGHT, 497 U.S. 805, 110 S.CT. 3139 (1990)?

This Court in Idaho v. Wright, 459 U.S. 805, 110 S.Ct. 3139 (1990), set the standard for out of court statements made by minor victims. The decision occurred after the trial in this case. However, in a post-conviction proceeding, the trial court applied Idaho v. Wright, to this case and found no violation. Thereafter, an appeal to the Minnesota Court of Appeals and Federal appeals followed. In addition, this Court decided White v. Illinois, 502 U.S. _____ 112 S.Ct. 736 (1992). It is clear that the statements made to a treating psychologist by a child victim are admissible under the medical treatment exception to the hearsay rule. Such statements are

firmly rooted hearsay exceptions with the attendant guarantees of reliability and trustworthiness. The trial transcript reveals that the treating psychologist, Dr. Pottebaum testified that he examined the victim for purposes of determining her need for psychotherapy (T.T., p. 94). This case is strikingly similar to Dana v. Department of Corrections, 958 Fed. 2d 237 (1992). The 8th Circuit Court of Appeals affirmed the admissibility of the testimony of a psychologist and pediatrician regarding a victim's hearsay statements in Dana. Dana was convicted in Minnesota State Court of two counts of First Degree Intrafamilial Sexual Abuse and given consecutive 43 month sentences. This Court denied review 112 S.Ct. 3043 (1992). In Dana and the present case, sexual assaults were committed by a significant other in the child's life. Both cases involved the application of the standard set forth in Idaho v. Wright, supra, White v. Illinois, supra, Minnesota Rules of Evidence, a Minnesota State Statute authorizing the testimony and applicable Minnesota Supreme Court decisions.

This court in Lanam v. Minnesota denied a Petition for Writ of Certiorari to the Minnesota Supreme Court, 111 S.Ct. 693 (1991). In Lanam, a male baby-sitter was convicted of two counts of Criminal Sexual Conduct in the First Degree for engaging in sexual penetration with a 3 1/2 year old girl. The young victim was found incompetent to testify. Out of court statements to a foster care provider and two social workers were used as a basis to convict Lanam. Lanam appealed to both the Minnesota Court of Appeals and the Minnesota Supreme Court making claims of confrontation clause violations. The Minnesota Supreme Court affirmed his convictions, 459 N.W.2d 656 (1990). The present case is strikingly similar to Lanam except the victim in the present case testified. There is no reason to grant review.

In the present case, the victim testified and was subject to cross-examination. Part of this testimony was live before a jury and the bulk of it was via videotape. Petitioner in his

request for a Writ of Certiorari selectively uses over 500 pages of trial transcript to try to make it appear there was insufficient evidence to justify a conviction or that the victim had been coached into making the allegations of abuse. Neither is correct. Petitioner testified at his trial. He never gave any indication of any animosity by the young victim or his ex-wife which would be so intense as to have the ex-wife convince her daughter to make up this story or for the daughter to make up this story. The Petitioner is the step-dad of the victim and thus has no visitation rights. At the time of the reporting, Petitioner was not a part of the life of the victim or the ex-wife. A child of such tender years could not fabricate the sexual conduct complained of.

II. DOES THE UNITED STATES SUPREME COURT HAVE JURISDICTION PURSUANT TO U.S. SUPREME COURT RULE 15.4 TO HEAR A CASE OF A HABEAS CORPUS PETITIONER WHEN THE PETITIONER HAS BEEN OUT OF CUSTODY FOR MORE THAN ONE YEAR AND THE HABEAS CORPUS PETITIONER WILL HAVE COMPLETED HIS PAROLE ON JANUARY 31, 1995?

The plain purpose of habeas corpus is to allow persons who are confined to challenge procedures used to convict them. In fact, 28 U.S.C. 2254(1) has as a requirement that the person be "in custody" to bring a petition for a writ of habeas corpus. To continue to hear a case and use scarce judicial resources when the Petitioner is no longer in custody does not comply with the plain words of the statute. It was revealed at oral argument before the Eighth Circuit Court of Appeals that the Petitioner was no longer in custody. Although some would allege that being on parole is a significant intrusion into a person's life and, therefore, jurisdiction should still attach,

even parole for the Petitioner will end on January 31, 1995. This would be significantly before this Court could reach any decision on the merits of the case. The State of Minnesota requests that the Court in its order denying relief specifically find that habeas corpus relief is dependent upon strict compliance with statutory requirements. 28 U.S.C. 2241(c), provides "the writ of habeas corpus shall not extend to a prisoner unless:

1. He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof."

In addition, 28 U.S.C. 2254 requires the petitioner be "in custody".

The Court should review its willingness to hear habeas corpus cases when the person is not in custody. The Court has fashioned a "collateral consequences" extension to the requirement of custody which is not found in the statute. This Court has repeatedly stated that habeas corpus is an extraordinary writ. The Respondent believes that as such, strict compliance with the requirements of the writ must be enforced. It has been over a decade since this Court wrote about collateral consequences as being a valid basis to invoke habeas corpus jurisdiction. In Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, in a footnote the Court indicated jurisdiction attached and the case was not moot because of collateral consequences. More recently in Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923 (1989), this Court found it had jurisdiction to review a case where a state sentence had expired but such conviction enhanced a Federal sentence for which the accused was in custody.

As recently as 1960, this Court in Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909 found that a case was moot and the Court did not have jurisdiction in a habeas corpus case where

the accused was no longer in custody. In Parker v. Ellis, the Court cited three similar cases where it denied relief because of mootness. McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24 (1934); Johnson v. Hoy, 227 U.S. 245, 33 S.Ct. 240; Ex Parte Baez, 177 U.S. 378, 20 S.Ct. 673 (1900). Therefore, in the first 60 years of this century, this court required custody for a Habeas Petitioner to go forward. In 1968, eight years after Ellis, in Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556 (1968), this Court overruled Parker v. Ellis. In overruling Ellis and its underpinnings, this Court decided to stray from enforcing the strict words of the statute and the long underlying history of the writ of habeas corpus. Considering, the long history of the strict construction of the availability of the writ of habeas corpus, this relatively short detour should come to an end and the Court should put the law back on the main highway of considering the Writ of Habeas Corpus as an extraordinary writ. This Court is familiar with the amount of litigation one criminal conviction can generate. Habeas corpus petitioners have had their convictions reviewed by appellate courts or are in procedural default for failing to appeal. Habeas corpus litigation must end when physical custody ceases.

CONCLUSION

There has been no error in the decisions of the state trial court, the Minnesota Court of Appeals, the Federal Magistrate, Federal District Judge or the Eighth Circuit. This court should deny further review. In its denial of review, the court should rule the Habeas Petitioner's case is moot because he is not in custody.

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Respectfully submitted,

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